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No. 01-1596

# In the Supreme Court of the United States

JOHN ROBERT SMITH, ET AL., CROSS-APPELLANTS

*v.*

BEATRICE BRANCH, ET AL.

*ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING CROSS-APPELLEES

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## QUESTION PRESENTED

Whether 2 U.S.C. 2a(c)(5) required the district court in this case to order at-large elections to remedy the State's failure to enact an enforceable congressional districting plan.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING CROSS-APPELLEES

### INTEREST OF THE UNITED STATES

The cross-appeal challenges the authority of a district court under 2 U.S.C. 2a(c)(5) and 2c to create districts for congressional elections when a State has failed to create congressional districts itself. The Attorney General is charged with enforcement of the requirements of the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* See, *e.g.*, 42 U.S.C. 1971(c), 1973j, 1973aa-2, 1973ee-4. Pursuant to that authority, the Attorney General may bring suit to enjoin enforcement of congressional districting plans that violate the Act. The United States has an interest in avoiding an interpretation of Sections 2a(c)(5) and 2c that would unduly restrict the remedial authority of federal courts in cases under the Voting Rights Act.

## STATEMENT

1. Article I, Section 2 of the United States Constitution requires that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Section 4 of Article I further provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of chusing Senators."

Pursuant to its authority under the final clause of Article I, Section 4, Congress has from time to time enacted statutes governing various aspects of congressional elections. In 1929, Congress enacted the current statutory scheme governing apportionment of the House of Representatives after the decennial census, and in 1941, Congress amended it by adding 2 U.S.C. 2a(c). Section 2a(c) addresses the election of Representatives after a reapportionment. It provides:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:
>
> (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected;
>
> (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at

large and the other Representatives from the districts then prescribed by the law of such State;

(3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State;

(4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or

(5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. 2a(c). Because Mississippi lost one Representative after the 2000 census, the cross-appeal in this case concerns the final clause of the statute, 2 U.S.C. 2a(c)(5).

In 1967, 26 years after Section 2a(c) was enacted, Congress passed 2 U.S.C. 2c, which generally mandated that Members of the House of Representatives were to be elected in single-member districts. It provides:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of

> this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. 2c.

2. After the 2000 census, the Mississippi State Legislature failed to pass a districting plan to take into account the State's loss of one seat in the House of Representatives. Cross-appellant and others filed suit before a federal three-judge court. They claimed that Mississippi's prior districting statute was unenforceable. As later amended, they also claimed that a districting plan ordered by a state court in litigation instituted by cross-appellees had to be enjoined, both because it had not been precleared under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, in time for use in the upcoming congressional elections, and because use of such a court-ordered plan for congressional elections would violate Article I, Section 4 of the Constitution. Cross-appellants therefore asked the federal court to draw up its own redistricting plan or order at-large elections pursuant to 2 U.S.C. 2a(c)(5).

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[1] The parenthetical clause was designed to permit Hawaii and New Mexico, which had never elected their representatives from districts, to elect their two Representatives at large in the 1968 election before moving to a single-member-district plan in 1970. See p. 16, *infra*.

The district court agreed that the State did not have a valid plan and that the state-court plan could not be used, both because it had not been precleared and because its use would violate Article I, Section 4. On February 26, 2002, the court enjoined the State from using either the prior districting statute or the state-court plan. The holding that the state-court plan was not precleared and would be unconstitutional is the subject of the main appeal in this case. J.S. App. 1a-3a. As a remedy, the district court did not order at-large elections, but instead issued its own redistricting plan. *Ibid.* That decision is the subject of this cross-appeal.

## SUMMARY OF ARGUMENT

The district court did not abuse its equitable discretion in developing interim congressional districts under the single-member-district command of 2 U.S.C. 2c and the consistent instructions of this Court, rather than ordering at-large elections under 2 U.S.C. 2a(c)(5). Cross-appellants' argument that the single-member-district mandate of Section 2c did not supersede Section 2a(c)(5) in cases like this would eviscerate the important congressional policy and terms of Section 2c.

The language of Section 2c provides that "there shall be established by law" single-member congressional districts in any State entitled to more than one Representative and that "Representatives shall be elected only from districts so established." That language is clear and unambiguous. This Court has consistently understood that courts, as well as legislatures, "establish law," and the terms of the statute thus govern any entity—judicial or legislative—responsible for fashioning plans for electing Representatives.

Moreover, the history of Section 2c demonstrates that Congress intended in 1967, when that provision

was enacted, to set forth a broad and general command that was *particularly* addressed to the courts that at that time were deeply engaged in the redistricting process. In the preceding few years, several courts had threatened to order at-large election of a State's entire congressional delegation if the State legislature could not enact a districting plan that complied with one-person, one-vote requirements. Those judicial decisions provided the backdrop against which Congress legislated. Although there was no committee report on the legislation, the debates in both the House and Senate repeatedly and specifically referred to the role of the courts in redistricting, the fear of court-ordered at-large elections, and the elimination of that threat through the enactment of Section 2c. By contrast, the debates do not evince any specific fear of the unlikely prospect that a legislature outside of Hawaii and New Mexico would require at-large elections. Accordingly, the context reinforces what the text of Section 2c makes clear: Congress eliminated at-large elections—regardless of their source—for the House of Representatives except perhaps in the most unusual circumstances.

The courts have consistently understood that Section 2c governs judicial action. All of the courts to address the interaction of Sections 2c and 2a(c) have agreed that the single-member-district mandate of Section 2c is controlling, at least where its mandate is practicable. Although Section 2a(c) retains validity as a "stop-gap" measure in a case in which exigencies of time make single-member districting impossible, no court has applied Section 2a(c) to order at-large election of Representatives since Section 2c was enacted.

Finally, overturning the settled authority requiring courts to use single-member-district remedial plans,

rather than ordering at-large elections, would have a series of exceptionally odd consequences. Under cross-appellants' theory, if a legislature in the position of Mississippi here enacted a law providing for at-large elections of the State's congressional delegation, a court would have to strike it down as a violation of Section 2c, but then would presumably be compelled by Section 2a(c)(5) to order the same at-large elections as a remedy. Moreover, the checkerboard coverage of Section 2a(c) would be exceedingly strange in States that were unable to redistrict themselves after a decennial apportionment. If the State kept the same number of seats, the district court would have to draw new districts. If the State added seats, the district court would draw new districts corresponding to the old number of seats, while ordering the new seats to be elected at large. If the State lost seats, the district court would have to order at-large elections for the entire delegation, even if that led to dozens of seats being filled in a chaotic at-large election. Congress enacted the single-member-district mandate of Section 2c to avoid that kind of electoral roulette, and Congress's mandate should be enforced.

## THE DISTRICT COURT WAS NOT REQUIRED BY 2 U.S.C. 2a(c)(5) TO ORDER AT-LARGE ELECTIONS

### A. A District Court Has Remedial Authority To Impose A Congressional Districting Plan

The district court in this case enjoined enforcement of the state-court plan, which provided for four districts from which to elect the Representatives to which Mississippi was entitled pursuant to the 2000 census, both on the ground that it had not been precleared under Section 5 and because it violated Article I, Section 4 of the Constitution. The State's prior five-

district plan was obviously unenforceable, because it did not comport with the 2000 apportionment, under which Mississippi lost one Representative. That left the State with no plan under which to elect the Representatives to which the State was entitled.

This Court has generally addressed the steps a district court should take in that situation. The Court has long made clear that a district court's remedial authority in such a case includes the power to issue a redistricting plan. See, *e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 86 (1997); *Upham* v. *Seamon*, 456 U.S. 37, 41 (1982); *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973). Moreover, the Court has recognized that, although a court has remedial discretion in that context, when courts "are put to the task of fashioning reapportionment plans * * *, single-member districts are to be preferred absent unusual circumstances." *East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636, 639 (1976); accord *Chapman* v. *Meier*, 420 U.S. 1, 17-19 (1975); *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Johnson*, 402 U.S. 690 (1971).[2]

Moreover, in cases such as this involving elections to the House of Representatives, Congress has enacted a statute requiring the use of single-member districts, rather than multi-member districts or at-large elections. Congress has provided in 2 U.S.C. 2c that in each State "there shall be established by law a number of districts * * * and Representatives shall be elected

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[2] Courts should also comply with Sections 2 and 5 of the Voting Rights Act in fashioning remedial plans. See *Abrams* v. *Johnson*, 521 U.S. 74, 90, 95-96 (1997).

only from districts so established."[3] That statute expresses a clear and unequivocal congressional requirement that Members of Congress should be elected from single-member districts. In this case, having found that Mississippi did not have a valid districting plan, the district court proceeded to do precisely what this Court's instructions and the command of Section 2c dictate: it issued an injunction requiring that Representatives be elected in accordance with a districting plan. It thereby "established by law" a single-member district plan, just as Section 2c requires.

**B. Cross-Appellants' Construction Of Section 2a(c)(5) To Preclude Judge-Made Congressional Districting Plans Disregards The Plain Language Of Section 2c And Is Inconsistent With Its History And Consistent Judicial Construction**

Cross-appellants' central contention is that, notwithstanding the command of Section 2c and this Court's consistent pronouncements, the federal district court's equitable authority was restricted by 2 U.S.C. 2a(c)(5), which provides that "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment * * * if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Repre-

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[3] Similar districting requirements had been periodically included in apportionment legislation from 1842 through 1911. See Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491; Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5; Act of Feb. 7, 1891, ch. 116, § 3, 26 Stat. 735; Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733; Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13. After the districting requirement in the 1911 Act expired, Congress failed to include a similar provision in the subsequent apportionment act of 1929. See Act of June 18, 1929, ch. 28, 46 Stat. 21; *Wood* v. *Broom*, 287 U.S. 1 (1932).

sentatives, they shall be elected from the State at large." Accordingly, in a case like this in which the state legislature neither drew congressional districts itself nor enacted a law providing for some other manner of drawing such districts, cross-appellants argue that a court has no authority to draw such a plan. Instead, under cross-appellants' theory, all a court can do is to order that congressional elections be conducted on an at-large basis.

1. Cross-appellants' theory is mistaken, because it fails to give full scope to the later-enacted Section 2c. As discussed above, the command of Section 2c is unambiguous and requires that single-member districts "shall be established by law" and that "Representatives shall be elected only from districts so established." 2 U.S.C. 2c. Contrary to that mandate, cross-appellants would have district courts require States in the situation here to elect all of their Representatives at-large. While cross-appellants are correct (Br. 13-15) that repeal by implication is disfavored, so is failure to give a later-enacted statute the full scope that its terms require. See, *e.g.*, *Gordon* v. *New York Stock Exch., Inc.*, 422 U.S. 659, 685 (1975); *United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870). In unusual cases in which exigencies of time make Section 2c's single-member district mandate impossible to satisfy, Section 2a(c)(5) retains validity as a "stop-gap" measure to avoid the entire loss of a State's representation in Congress. But in cases in which its mandate is possible to satisfy, Section 2c requires single-member districts.

Cross-appellants argue (Br. 15) that Section 2a(c)(5) and Section 2c can be reconciled by construing Section 2c's requirement that single-member districts shall be "established by law" to "refer to legislation, not to any

form of litigation." They assert (Br. 17) that "[o]n its face, § 2c is addressed, not to the courts, but solely to the lawmaking authority."[4]

Cross-appellants' contention is mistaken. The terms "established by law" comfortably encompass judicial decisions, as well as legislative decisions. For example, the federal habeas statute precludes habeas relief for a state prisoner based on a claim adjudicated in state-court proceedings "unless the adjudication of the claim * * * resulted in a decision that was contrary to, or involved an unreasonable application of, clearly *established Federal law*, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1) (emphasis addded). See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). The "law" that must be "clearly established" under that provision ordinarily refers to judicial decisions—in particular, those of this Court. In other contexts as well, the term "established law" frequently includes—or even has as its primary referent—judicial decisions. See, *e.g.*, *Hope* v. *Pelzer*, 122 S. Ct. 2508, 2516 (2002) ("established law"); *Swidler & Berlin* v. *United*

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[4] A more plausible reconciliation than that offered by cross-appellants would be simply to construe the term "in the manner provided by the law thereof" in the opening "unless" clause of Section 2a(c) to refer to any law binding on the State—including, in particular, federal law, which is binding on the States under the Supremacy Clause. U.S. Const. Art. VI ("[T]he Laws of the United States * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby."). This Court's decisions "have repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign." *Testa* v. *Katt*, 330 U.S. 386, 391 (1947). If Section 2a(c) were construed in that manner, then, in the terms of the "unless" clause of Section 2a(c), the State was "redistricted in the manner provided by the law thereof" by virtue of the federal court order in this case, and Section 2a(c)(5) is simply inapplicable.

*States*, 524 U.S. 399, 407 (1998) ("established law"); *United States* v. *Frady*, 456 U.S. 152, 156 (1982) ("long-established law"); *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978) ("established law"); *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967) ("established law") (per curiam); *McCrary* v. *Illinois*, 386 U.S. 300, 313 (1967) ("established law"); *Tehan* v. *Shott*, 382 U.S. 406, 409 (1966) ("established law").

3. The historical context and legislative history of Section 2c confirm, as the statutory text indicates, that Congress understood that congressional electoral plans could be "established by law" pursuant to court orders as well as legislation. The context and history demonstrate that Congress specifically intended Section 2c to require courts to construct single-member districts rather than ordering at-large elections.

The question of what constraints to place on state legislatures after a reapportionment had simmered for decades, since Congress had failed to enact legislation following the 1920 census. See *Wood* v. *Broom*, 287 U.S. 1, 6 (1932). But when Congress enacted Section 2c in 1967, the immediate issue was the involvement of the courts in fashioning electoral plans. The Voting Rights Act of 1965, with its assignment to the federal courts of jurisdiction to involve themselves in elections, had only recently been enacted. Even more significant, this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186 (1962), *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), had ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their electoral practices—including their congressional electoral practices —to constitutional one-person, one-vote standards. The risk arose that federal courts forced to fashion remedies for one-person, one-vote violations would order at-large

elections of large numbers of Representatives. It was precisely in that highly charged context, in which the role of courts in redistricting was at the center of public and congressional attention, that Congress enacted Section 2c and directed its mandate at any entity—but in particular at courts—responsible for drawing congressional districts.

a. At the time Congress enacted Section 2c, at least six district courts, two of them specifically invoking Section 2a(c)(5), had stated that, if the state legislature was unable to correct malapportioned congressional districts, the court would order the State's entire congressional delegation to be elected at large. In *Grills* v. *Branigin*, 255 F. Supp. 155 (S.D. Ind. 1966), rev'd, 385 U.S. 455 (1967), a three-judge court had held Indiana's 1941 congressional districting plan unconstitutional, but held that a new plan adopted in 1965 satisfied constitutional one-person, one-vote standards. In *Duddleston* v. *Grills*, 385 U.S. 455 (1967), this Court summarily reversed in light of its previous one-person, one-vote cases, indicating that the population deviation even in the 1965 plan was unconstitutional. Indiana, which had been entitled to 11 Representatives since the 1940 census, accordingly had no valid plan for that number of districts, because the State's pre-1941 plan would have been for the twelve seats to which it was entitled after the 1930 census. As a result, the State faced the very real prospect that a situation precisely analogous to that in Section 2a(c)(5) would arise, and the court would order at-large elections of the entire eleven-person delegation.

On February 3, 1965, a three-judge district court in Arkansas, whose House delegation had decreased from six to four Members after the 1960 census, stated that under Section 2a(c)(5), "if the Legislature * * * had

taken no action [after the 1960 apportionment] the congressmen would have been required to run at large," and that the same reasoning would compel the court to require at-large elections if the legislature were unable to correct its malapportioned congressional districts. *Park* v. *Faubus*, 238 F. Supp. 62, 66 (E.D. Ark. 1965). On August 5, 1966, a three-judge court in Missouri, whose House delegation had decreased from eleven to ten Members after the 1960 census, had informed the State that if it were unable to redistrict in accordance with the Constitution, pursuant to the "command of Section 2a(c)[(5)]," "the congressional elections for Missouri will be ordered conducted at large until new and constitutional district are created." *Preisler* v. *Secretary of State of Mo.*, 257 F. Supp. 953, 981, 982 (W.D. Mo. 1966), aff'd 385 U.S. 450 (1967). See *Preisler* v. *Secretary of State of Mo.*, 279 F. Supp. 952, 968 (W.D. Mo. 1967) (later opinion repeating that court had based its ruling on Section 2a(c)(5)), aff'd, 394 U.S. 526 (1968).

In *Bush* v. *Wartin*, 251 F. Supp. 484, 490 & n.17 (S.D. Tex. 1966), a three-judge court in Texas had told the Texas legislature that, if it did not enact districting legislation that complied with one-person, one-vote standards, the court would order the entire 23-person Texas delegation to be elected at large. See also *Meeks* v. *Anderson*, 229 F. Supp. 271, 273-274 (D. Kan. 1964) (recognizing that such relief could be "appropriate" for Kansas, which had lost one seat in 1960 apportionment); *Calkins* v. *Hare*, 228 F. Supp. 824, 830 (E.D. Mich. 1964) (same for Michigan, which had lost one seat in 1960 apportionment); cf. *Wells* v. *Rockefeller*, 273 F. Supp. 984 (S.D.N.Y.) (holding districts in New York, which had lost two seats in 1960 apportionment, unconstitutional but abstaining from ordering relief), aff'd, 389 U.S. 421 (1967); *Baker* v. *Clement*, 247 F.Supp. 886, 897-

898 (M.D. Tenn. 1965) (holding districts in Tennessee unconstitutional and mentioning possibility of at-large elections, but abstaining from issuing relief); *People* v. *Kerner*, 208 N.E. 2d 561, 566-567 (Ill. 1965) ("Should the General Assembly fail to redistrict, the task must be performed by some other agency *or an at large election held* for all representatives in Congress.") (emphasis added).

b. The congressional debates make quite clear that Congress was vitally concerned that courts—such as those in the above cases and others in unreported current decisions and in the future—could order at-large elections of Representatives. No participant in the debates expressed any specific concern that a legislature outside Hawaii and New Mexico, as opposed to the courts, would provide for at-large elections, although there was general agreement that the best solution was simply to require, once and for all, the election of Representatives in single-member districts.

Senator Birch Bayh of Indiana—where the *Grills* litigation had threatened at-large elections of the entire House delegation—introduced what was to become Section 2c in the Senate on November 8, 1967, as a rider to a private immigration bill. 113 Cong. Rec. 31,718. Senator Bayh stated that he hoped to take from an extensive congressional redistricting bill one part "over which there was no dispute, or a minimal amount of dispute, and attach that part" to the pending immigration bill. *Id.* at 31,719.[5] As introduced, the bill excluded

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[5] Cross-Appellants attempt (Br. 18-19) to draw significance from the fact that Congress previously failed to pass legislation that would have explicitly replaced Section 2a(c) with the new districting requirements for House elections. The legislative history, however, demonstrates that those measures failed because they contained controversial provisions purporting to set mathe-

New Mexico and Hawaii, two States that had never had congressional districts and had elected their two Representatives at large. *Ibid.* Senator Bayh explained that, "if [Hawaii and New Mexico] are excluded from the overall coverage, it can pass the House and we can get a prohibition of at-large elections, which we all believe is necessary." *Ibid.*

After the bill was introduced, Senator Baker almost immediately offered an amendment that eliminated the exclusion for Hawaii and New Mexico and eliminated as well an additional provision that would have made clear that the new law did not require States to reconfigure existing districts until the 1970 census data were available. See 113 Cong. Rec. at 31,718. Senator Baker's amendment was accepted by the Senate. See *id.* at 31,720. Both bills otherwise prohibited at-large elections using almost identical language. *Ibid.* One difference, however, led to an important colloquy

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matical standards for population disparities between districts. See, *e.g.*, 113 Cong. Rec. at 31,696 (statement of Sen. Ervin); *id.* at 31,701 (statement of Sen. Baker); *id.* at 34,366 (statement of Sen. Bayh); S. Rep. No. 291, 90th Cong., 1st Sess. 9-26 (1967). In a final effort to salvage some portion of the legislation, Senators Baker and Bayh extracted a single provision of the overall legislation and attached it to the pending immigration bill. See, *e.g.*, 113 Cong. Rec. at 31,701 (statement of Sen. Baker); *id.* at 31,718 (statement of Sen. Baker); *id.* at 31,719 (statement of Sen. Bayh). The debates preceding the passage of that single provision, which became 2 U.S.C. 2c, demonstrate that Congress believed that Section 2c would be as effective in precluding at-large elections as the prior versions of the bill that included an explicit repeal of Section 2a(c). Cf. 113 Cong. Rec. at 11,073 (colloquy between Sens. Brademas and Cellar regarding predecessor version preventing court-ordered at-large elections); *id.* at 31,720 (colloquy between Sens. Baker and Bayh regarding final version preventing court-ordered at-large elections).

regarding the application of Section 2c to redistricting by courts. Senator Bayh's version required that "there shall be established a number of districts" for House elections, while Senator Baker's version required that "there shall be established *by law* a number of districts." *Ibid.* (emphasis added).

In that connection, Senator Bayh stated that he "would interpret 'by law' to mean if the reapportionment is done either by the State legislatures or by the court," and he asked whether Senator Baker "agrees with that interpretation." 113 Cong. Rec. at 31,719. Senator Baker responded that "in the ordinary course of events, it is clearly the province of the State legislature to [redistrict]" and that "only if State legislatures failed in their performance of that duty that there would be any derivative right of the judiciary, Federal, or State, to intervene." *Ibid.* The colloquy continued, with Senator Bayh noting that "if it is bad government for the legislature to say that Congressmen should run at large, then it is bad government for the court to have an entire group of Congressmen running at large in a State." *Ibid.* Senator Baker agreed, explaining that "in Tennessee, * * * the legislature was not able to agree on redistricting, and the Federal judiciary undertook to redistrict, did so." *Id.* at 31,719-31,720. He concluded:

> If we should fall on those unhappy circumstances, I would greatly prefer that the judiciary, State or Federal, designate individual single-Member districts; running at large never really accommodates the principle of equal representation. It never really accommodates the idea that the House of Representatives is properly made up of Representatives of districts of varying interests.

*Id.* at 31,720. So as to leave no ambiguity, the two Senators had the following colloquy:

> Mr. Bayh. Perhaps I was not clear in the first question. Let me rephrase the question in light of the colloquy.
>
> When we say "as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative," we are talking about either of two situations—whether the legislature reapportions or whether the court reapportions.
>
> Mr. Baker. The Senator is correct.

*Ibid.* Immediately following that exchange, the Senate agreed to Senator Baker's substitute amendment. There was one final exchange that made the same point:

> Mr. Bayh. * * * This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal Court.
>
> Mr. Baker. That is my understanding.

*Ibid.* The Senate debate is inconsistent with cross-appellants' contention that Section 2c's mandate for single-member districts was not directed at the courts.

c. The House considered the bill on November 28, 1967. Most of the controversy generated by the bill resulted from questions about the propriety of the Senate's decision to attach the bill to a non-germane

private immigration bill and from a heated dispute about whether a temporary exception, valid only for the 1968 elections, should be included for Hawaii and New Mexico. 113 Cong. Rec. at 34,034-34,038. Two points, however, are clear from the debate, and both of them belie cross-appellants' theory that Section 2c's mandate was directed at legislatures and not at courts. First, the House Members viewed the central problem facing them as the risk of at-large congressional elections caused by judicial decisions holding States to be malapportioned and the consequent risk that, if legislatures could not agree on districting plans, *courts* would order at-large elections. Second, the House viewed the bill as providing a solution to that problem by prohibiting at-large congressional elections entirely—whether ordered by a court or required by a legislature.

For example, Congressman Celler referred to the possibility that, due to the *Grills* litigation in Indiana, a court might order all eleven Members of the House from Indiana to face at-large election under Section 2a(c)(5). 113 Cong. Rec. at 34,034 ("Unless [the bill] is adopted, there may be unfortunate effects upon the State of Indiana. * * * At the importunities of the Members from the great State of Indiana, it was thought that we should prohibit election of Members at large."). Congressman Celler was clear about the effect of Section 2c: the bill "in essence, provides that there can be no election of a Representative at large. * * * If it prevails, there will be no more elections of Representatives at large forever." *Ibid.*

Congressman Smith agreed that "[t]he language in the private bill will prohibit any State from running at large in any future elections," although he favored the exception for Hawaii and New Mexico. 113 Cong. Rec. at 34,035. He also noted the difficulty that could occur

in his home State of California, which was under court order to redistrict, but whose legislature was having difficulty agreeing on a plan: "If the legislature cannot do it, then it might be a question of the Supreme Court not being able to do it either. * * * If the 38 Representatives in California have to run at large, it could be disastrous to the State." *Ibid.* Congressman McClory, similarly referred to "the problem you have in California and perhaps in other large States where the State is under compulsion of an order of the State court or decisions of the Supreme Court." *Ibid.* Congressman Denney noted that "just last Wednesday a three-judge panel ruled that the State of Nebraska [his home State] was not properly districted and that the legislature must redistrict * * * prior to March 15, or the three representatives of that great State would have to run at large." *Id.* at 34,037. Congressman Jacobs of Indiana noted that the State delegation "faces the very serious threat of running at large, * * * which * * * would * * * produce utter chaos," and supported the bill on the ground that "[i]f this bill should become law, then in any State whose districts are declared unconstitutional a court could draw district lines." *Ibid.* Congressman Pepper added that if the bill did not pass, "we do not know how many States in the Union would, either by the action of their courts or their legislatures, have to have elections of House Members-at-Large." *Ibid.* The bill ultimately passed, with an amendment excluding Hawaii and New Mexico for the 1968 elections only. *Id.* at 34,028.

d. On November 30, 1967, the Senate passed the bill as amended by the House. 113 Cong. Rec. at 34,369-34,370. Again, the controversy centered on the exclusion of Hawaii and New Mexico, and the debate demonstrated the Senate's continuing and specific concern

with the possibility of court-ordered at-large elections and its decision to eliminate that possibility by requiring once and for all that Representatives be elected from single-member districts, regardless of whether the legislature or the court is responsible for the electoral plan.

Senator Fong, who supported the House amendment excepting Hawaii and New Mexico, explained that the exception would apply only to the 1968 election and that "[b]eginning with the elections in 1970, no State will elect any Congressman at large. That is the substance of this bill." 113 Cong. Rec. at 34,364. See *ibid.* ("Beginning with the 1970 elections, and for every congressional election thereafter, every State of the Union, with no exception, must elect its Congressman from single-member districts."). In debating the exception, Senators Allott and Hruska, who objected to the exclusion, specifically referred to the burdens that had been imposed on other States by court-ordered redistricting, *id.* at 34,366; see also *id.* at 34,369 (statement of Sen. Brooke to same effect), as did Senator Holland, who supported the exclusion, *id.* at 34,368.

Senator Bayh also again focused the Senate's attention on the risk of court-ordered at-large elections:

> Well, the reason [the bill] is necessary, quite frankly, is the fact that, in some States, a court has mandated the States to reapportion. There is a great likelihood that, if agreement cannot be reached within a State, the court could well order the entire congressional delegation to run at large.
>
> The purpose of this particular bill is to avoid this possibility.

113 Cong. Rec. at 34,366. He repeated that theme three times more. See *id.* at 34,367 ("[W]e should not allow a Federal court—if you please—require that congressional candidates must run at large."); *ibid.* ("So it is important that we pass this measure now so that the Federal courts do not order elections at large, which could happen in the State of California, for example."); *id.* at 34,369 (describing amended bill as "effort to try to see to it that 48 States are in fact not ordered by a court to have elections at large"). Senator Fong also referred to the imminent risk of court-ordered at-large elections in Indiana. *Id.* at 34,367 ("This bill, as I see it, is framed only for States such as Indiana; under court order to elect their Representatives at large."). Senator Ervin urged passage of the bill because "[i]f we do not do so, we are going to create a situation of chaos next fall, because the Supreme Court will require candidates for Congress in States which do not live up to the one-man, one-vote principle on the basis of the 1960 census to run at large." *Id.* at 34,368. Finally, immediately after the Senate approved the House measure, Senator Mansfield stated that Senator Inouye "demonstrated outstanding skill and ability in handling this proposal that bars at-large congressional elections." *Id.* at 34,370.

4. The language of Section 2c thus comfortably includes courts, as well as legislatures, within its single-member-district mandate, and the text and history of the provision demonstrates that Congress intended to eliminate the possibility that any entity—legislatures and, especially, courts—would order at-large elections to the House. Judicial decisions have consistently reached the same conclusion. Although at least one court has recognized that Section 2a(c)(5) retains vitality in the hypothetical situation in which exigencies of time make the single-member-district command of

Section 2c impossible to satisfy, the courts have uniformly held that the clear mandate of Section 2c was intended to override Section 2a(c)(5) and any other law purporting to justify at-large election of Representatives.[6] Indeed, at least since Section 2c was enacted, no court has applied Section 2a(c)(5) to order at-large elections.[7]

a. The first court to examine Section 2c, just two weeks after that statute was enacted, was the three-judge district court in the Western District of Missouri, which had previously threatened to order at-large elections in accordance with Section 2a(c)(5). In its decision on December 29, 1967, *Preisler* v. *Secretary of State of Mo.*, 279 F. Supp. 952 (W.D. Mo. 1967), aff'd, 394 U.S. 526 (1969), the court reversed its prior position and stated that it would *not* order at-large elections, but would instead fashion a districting plan if the state legislature failed to enact its own plan. The court

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[6] This Court adverted to the issue in *Whitcomb* v. *Chavis*, 403 U.S. 124, 158-159 n.39 (1971). The Court noted "[i]n 1842, Congress by statute required single-member districts for congressional elections," and that "[t]he substance of the restriction was continued * * * until 1929." *Ibid.* The Court then noted that Congress had enacted Section 2a(c). But, the Court explained, "[i]n 1967, Congress reinstated the single-member district requirement." *Ibid.* (citing Section 2c).

[7] This Court has repeatedly approved court-ordered congressional redistricting plans without suggesting that the courts involved should have required at-large elections under Section 2a(c). See *Abrams* v. *Johnson*, 521 U.S. 74 (1997) (redistricting plan for Georgia, which had gained one seat after 1990 census); *Upham* v. *Seamon*, 456 U.S. 37, 41 (1982) (redistricting plan for parts of Texas; State had gained three seats after 1980 census); *White* v. *Weiser*, 412 U.S. 783 (1973) (redistricting plan for Texas, which gained one seat in 1970 census).

explained that two significant events had triggered the enactment of Section 2c:

> The Supreme Court's reversal of the Indiana three-judge court in *Grills*, and the affirmance of [the district court's own August 1966 decision] last January, of course, focused Congressional attention on the fact that [Section 2a(c)] was indeed a Congressional command to the federal three-judge court in Indiana and to this Court to order elections-at-large in the event the Legislatures of Indiana and Missouri should fail to pass a constitutional redistricting act in time for the 1968 elections.

279 F. Supp. at 968. As a result of Congress's newfound attention, the enactment of Section 2c "relieved [the district court] of the prior Congressional command to order that the 1968 and succeeding congressional elections in Missouri be held at large." *Id.* at 969. The court concluded that therefore, contrary to its 1966 ruling, if the legislature fails to enact a constitutional plan, the court "will be free * * * to direct appropriate proceedings that will enable it to make an appropriate redistricting order." *Ibid.* Accordingly, the *Preisler* court held that the unqualified mandate of Section 2c superseded the "prior congressional command" of Section 2a(c)(5) that Missouri's congressional delegation would have to be elected on an at-large basis.

b. Since *Preisler*, every court that has addressed the issue has held that Section 2c requires courts whenever possible to draw single-member districts, notwithstanding Section 2a(c). In *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo.), aff'd, 456 U.S. 966 (1982), the court found that after the 1980 census Missouri had again failed to enact a constitutional districting plan. Considering the remedial options, the court noted that

it could fashion a districting plan or could order at large elections pursuant to Section 2a(c)(5). The court noted, however, that Section 2c "appears to prohibit at-large elections." *Id.* at 926. The court recognized that "repeals by implication are not favored," but it nonetheless held that "the plain language of section 2c is inconsistent with section 2a(c)(5), warranting a finding of repeal by implication." *Id.* at 927. The court also based its conclusion on the fact that "nothing in section 2c suggests any limitation on its applicability" and the floor debate on Section 2c (discussed above) "indicates that Congress intended to eliminate the possibility of at-large elections, including those in situations where the legislature had failed to enact a plan." *Id.* at 926.

In *Carstens* v. *Lamm*, 543 F. Supp. 68 (D. Colo. 1982), the court reached a substantially identical result, although the court specifically noted that Section 2a(c) retains vitality in cases in which compliance with Section 2c is impossible. At issue in that case was Section 2a(c)(2)—a correlative of Section 2a(c)(5) that required at-large election of *additional* Representatives if districts had not been created under state law. The Court explained that "Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives," thus eliminating the effect of Section 2a(c)(2) in the case before it. *Id.* at 77. Characterizing Section 2a(c) as a "stop-gap measure," *id.* at 77 n.23, the court found that Congress did not repeal it because "[a]rguably, Congress * * * did not want to leave a state without a remedy in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Id.* at 77. As the court noted, "[t]here is nothing in the language of

Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely assistance to the state in resolving a redistricting dispute." *Id.* at 78.

Finally, the California and Virginia Supreme Courts have reached the same conclusion. After the 1970 census, California had gained five seats in the House, but the State had failed to enact redistricting legislation. In *Legislature* v. *Reinecke*, 492 P.2d 385 (1972), the California Supreme Court explained that accordingly, "unless congressional districts are reapportioned, the office[s] of five representatives will either have to be left unfilled or filled by statewide elections." *Id.* at 390. Citing 2 U.S.C. 2c, the court concluded that it "cannot accept either alternative, for Congress has expressly provided that California shall elect 43 representatives *from 43 single member districts*." *Ibid.* (emphasis added). In another, similar situation that arose after the 1980 census, the California Supreme Court again concluded that Section 2c "forbids the use of statewide elections to fill congressional seats" and that "the legislative history of section 2c reveals, as does its plain language, that Congress intended 2c to supersede the provisions of section 2a, subdivision (c)." *Assembly of the State of Cal.* v. *Deukmejian*, 639 P.2d 939, 953-954 (Cal. 1982).[8] Accord *Simpson* v. *Mahan*, 185 S.E.2d 47, 48 (Va. 1971) (holding that, in light of Section 2c, the

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[8] In *Republican National Committee* v. *Burton*, 455 U.S. 1301 (1982), then-Justice Rehnquist denied a stay of the court's order providing for new districts in California. He noted that he did not reach any question regarding the effect of Section 2c, because he found that the state court's judgement "appears to be based on adequate and independent state grounds." *Id.* at 1302. The full Court subsequently dismissed the appeal. See *Republican Nat'l Comm.* v. *Burton*, 456 U.S. 941 (1982).

court could not order the state board of elections to certify congressional candidates for election at large).

### C. Cross-Appellants' Construction Of The Relevant Statutes Would Produce Absurd Results

1. Cross-appellants' theory produces absurd and unusual results that Congress could not have intended. If a State that has lost one or more seats after a decennial census, like Mississippi here, enacted a statute requiring at-large election of its congressional delegation, the statute would clearly violate Section 2c, even under cross-appellants' theory that it restricts legislative action only. Under cross-appellants' theory, the at-large election plan would violate Section 2c, yet as a remedy Section 2a(c)(5) would require the court to order the State to conduct an at-large election—thus making the remedy precisely the same as the violation. The same would be true if a State gained seats and enacted a statute to fill them by at-large election. Although such a statute would plainly violate the single-member district mandate of Section 2c, a court's only choice in remedying the situation would be to order the State to fill the new seats under Section 2a(c)(2) by at-large election. Congress could not have intended that result when it enacted Section 2c.

2. In addition, cross-appellants' construction would have other odd effects. The general scheme of Section 2a(c) is to require the use of "the districts then prescribed by the law of [the] State" after a decennial apportionment, 2 U.S.C. 2a(c)(1) and (3). If the districts provided for in the State's pre-apportionment law are too few in number, the districts that exist are to be used and the extra seats are to be filled through at-large elections. 2 U.S.C. 2a(c)(2) and (4). If the districts provided for in the State's pre-apportionment law are

too many in number, the entire delegation is to be elected at large. 2 U.S.C. 2a(c)(5).

Unless Section 2c's single-member-district mandate is permitted to have effect, the scheme of Section 2a(c) would make little sense. Unless population change is uniformly distributed across congressional districts, a State's pre-census districts will generally be malapportioned under one-person, one-vote principles after a new census, and accordingly a court will not be able to use them in drawing a districting plan. That creates a strange checkerboard pattern of coverage for Section 2a(c). If the State keeps the same number of seats and is unable validly to redistrict itself, a court is free to draw single-member districts, because using the State's existing districts under the mandate of Section 2a(c)(1) would be unconstitutional under one-person, one-vote principles. If the State gains seats and is unable validly to redistrict itself, then the new seats must be elected at-large under Section 2a(c)(2), but the court is free to draw new districts for the number of seats the State had at the last census; once again, one-person, one-vote principles will likely preclude the use of the State's own pre-apportionment districts. In that situation, even though there is a palpable need to draw new districts for the new seats, the court may only draw districts for the old number of seats in the House. And where a State, as here, loses seats and is unable validly to redistrict itself, the only remedy would be at-large election of the entire delegation—even if that meant a chaotic at-large election of, for example, all 29 seats in the New York congressional delegation (reduced from

31 to which New York was entitled after the 1990 census).[9]

It is very unlikely that Congress intended that kind of coverage of Section 2a(c), which appears to permit courts to draw districts and require courts to order at-large elections in a way that serves no recognizable goal or purpose. Section 2c's unequivocal mandate that Members of the House of Representatives should be elected from single-member districts (except where exigencies of time render that impracticable, see *Carston* v. *Lamm*, *supra*) resolves that problem. It creates a workable and sensible regime that faithfully fulfills Congress's purpose when it enacted Section 2c in 1967. Cross-appellants' contention that the federal court in this case could simply disregard Section 2c should be rejected.

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[9] The possibility of such chaos may have been reasonably remote in 1941, when Section 2a(c)(5) was enacted. But it became much greater by the time of the enactment of Section 2c, after *Baker* v. *Carr*, 369 U.S. 186 (1962), and the enactment of the Voting Rights Act of 1965, both of which increased the likelihood that a state congressional redistricting plan would be held invalid and the State would be left without a valid congressional districting plan. See also *Shaw* v. *Reno*, 509 U.S. 630 (1993) (recognizing constitutional racial redistricting challenge to congressional districts); *Bush* v. *Vera*, 517 U.S. 952 (1996) (same); *Miller* v. *Johnson*, 515 U.S. 900 (1995) (same). If and when that happens in a State that has lost one or more Representatives after a decennial apportionment, cross-appellants' construction would leave large States at the mercy of chaotic at-large elections required by Section 2a(c)(5).

## CONCLUSION

If the Court affirms the district court's order enjoining use of the state-court plan, the remedial order of the district court should be affirmed.

Respectfully submitted.

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